No. 88-1377 (18)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner,

v.

BRIAN ZEBLEY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' SECOND SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES

I. INTRODUCTION

Respondents file this brief to address the Secretary's supplemental brief submitted to the Court on the eve of the November 28, 1989 argument of this case. Pursuant to Rule 35.5, this brief is confined to a discussion of new matters, including those raised by the Secretary, namely, his press release announcing non-regulatory changes in the children's SSI program and the status of legislation in Congress.

II. THE SECRETARY'S BELATED COSMETIC IMPROVEMENTS IN THE SSI CHILDREN'S PROGRAM LEAVE UNCHANGED THE FUNDAMENTALLY INFERIOR EVALUATIONS CHILDREN RECEIVE IN COMPARISON TO ADULTS

Six years after this action was filed and seven days before oral argument, the Secretary has issued a press release announcing the following changes in the SSI children's program: (1) a second review, under current unchanged standards, before a denial of benefits may be issued for children under age three or for older children who are suffering from an impairment that the Secretary has found to be subject to high error rates (in his *Preliminary Staff Report: Childhood Disability Study*, Sept. 20, 1989, lodged with the Court); (2) the requirement that adjudicative entities include pediatricians on their staff; (3) review of the medical criteria for all childhood impairments; and (4) education of examiners and medical personnel to insure understanding of current requirements. *See* Press Release of HHS Secretary Louis W. Sullivan (Nov. 21, 1989) (Pet. Supp. Br. 1a-2a.)

These changes fall far short of what the *Zebley* court held was required by Congress, namely, a beyond-the-listings, individualized assessment of the functional limitations of "any" childhood mental or physical impair-

ment. They also on their face are grossly inadequate to address the endemic arbitrariness in the Secretary's adjudication of childhood disability claims.

First, it is clear that there is no remedy, much less recognition, in this last minute, extra-regulatory announcement of the fundamental failure of the program to evaluate the various effects on the child's daily living activities of a host of childhood afflictions, such as spina bifida, cystic fibrosis, muscular dystrophy, ment l retardation, etc., which respondents and all *amici* have shown cannot meet or equal current standards. The Secretary recognized this critical failing in his Reply Brief, wherein he attempted to address the bald declaration of Social Security Ruling 83-19 that "it is incorrect to consider whether the listing is equaled on the basis of an assessment of *overall* functional impairment," and that the "functional consequences of the impairments . . . *cannot* justify a determination of equivalence [to the impairment listings]" (J.A. 239-40) (emphasis in original). The Secretary, in light of this ruling, represented to this Court "that consideration is being given to a possible clarification of SSR 83-19 on this point." (Reply Br. 15 n.10). it is now obvious that the Secretary has refused to make any change in SSR 83-19, which leaves unremedied his deficient evaluation of functional limitations of children suffering from the above-identified afflictions and numerous others. *See, e.g.*, Am. Br. of A.M.A. and Amer. Acad. of Pediatrics, et al. 8-33; 22; and Am. Br. of the Nat'l Easter Seals Society, et al., n.9.[1]

[1] The vices of SSR 83-19 has been set forth in detail in the Amicus Brief of the Nat'l Easter Seals Society et al., 13-17. The Secretary's tortured attempt to negate the plain language of SSR 83-19, and to somehow harmonize it with the diametrically contrary statements on equivalency contained in his *Preliminary Staff Report*, Tab. E, at 2, and in his Reply Brief, 15 n.10, is frivolous. (Pet. Supp. Br. 6-8). SSR 83-19 remains unaltered as the authoritative national policy pronouncement binding on all the Secretary's disability adjudicators.

Second, the "double review" proposed for infants and classes of cases involving shockingly high error rates (*see* Resp. Supp. Br. 22), becomes a bureaucratic exercise when the second review, after an initial denial has been rendered, would be premised on the *same* faulty standards and procedures utilized for the first decision. Unless the Secretary is ready to evaluate, for example, the impact of many hours of necessary daily pulmonary toileting of a cystic fibrosis child and the debilitating effects of repeated infections and hospitalizations for such a child, a "second" review adhering to unrealistic listings criteria, accomplishes little and masks an inherently arbitrary adjudication system. Similarly, the availability of pediatrician review is inherently inadequate where the pediatrician, as any other agency physician, must apply the same outmoded and rigid listings.[2] Finally, educating disability examiners as to *current* requirements for adjudicating childhood claims is a further bureaucratic exercise ignoring the inadequacies of current inferior standards and procedures for evaluating childhood cases.

Third, the proposed "review" of the listings at some uncertain date in the future is both too vague and too late to remedy the claims in this action. The Secretary is only belatedly responding to the widespread consensus in the medical community that the childhood listings, virtually unchanged since issued in 1977, are "woefully" outdated, Am. Br. of A.M.A. and Amer. Acad. of Pediatrics, et al. 22.[3] The snail-like pace of revisions being considered,

[2] The Secretary's announcement merely directs adjudicative entities "to include pediatricians among their medical personnel," far short of requiring that a pediatrician be utilized in each childhood case.

[3] The Secretary's defense of the absence of a Down Syndrome listing (Pet. Supp. Br. 4, n.3), despite its longstanding recognition by the medical community, is belied by the Amicus brief of the National Down Syndrome Congress. *See* Am. Br. of the Nat'l Easter Seals Society, et al. 17, n.9.

such as the still-pending consideration of a Down Syndrome listing, over two years since the NPRM was published and many decades after the medical community had identified this chidhood malady (*see* Resp. Supp. Br. 8), itself bespeaks the inadequacy of revisions of particular listings. More fundamentally, listings have never addressed, nor has the Secretary in his press release proposed their addressing, the absence of any realistic, individualized functional assessment step, similar to the adult's RFC evaluation. The Secretary's announcement also fails to address the listings inability to take into account functional consequences of disabilities such as the combined impact of multiple impairments, the presense of pain (which is nowhere mentioned in any existing or proposed adult or childhood listing), the effects of medication, etc. (*see* Resp. Br. 21-24). Likewise, the Secretary's proposed review does not address the equally fundamental flaw that the listings explicitly impose on children the stricter Widow's Disability test of "any gainful activity," which the Congress refused to legislate for the children's SSI program. (*Id.* at 25-26).

III. THE RECENT CONGRESSIONAL RECESS IS OF NO IMPORT

The Secretary reports deletion from the 1989 budget reconciliation act by the 101st Congress in its first session of all legislative provisions "that did not reduce the deficit." (Pet. Supp. Br. 2, n.2). As the Secretary noted in his Brief (*id.* 2), the provisions which would have clarified existing law to require realistic, individualized assessments of functional limitations of children beyond the listings were just one of "many provisions" deleted soley because they were non-deficit reducing.

The *Zebley* case had awakened Congress for the first time to the gross inequities in the SSI childhood program

and all the legislation introduced this year in both the House and Senate is uniformly critical of the Secretary's policies as not comporting with the intent of Congress (*see* Resp. Supp. Br. 1-5). Congress has now recessed without completing action on this proposed legislation, but these bills are still pending. Given the press of deficit reducing legislation, Rep. Thomas J. Downey, Chairman of the Subcommittee on Human Resources of the Committee on Ways and Means, a chief sponsor of the House bill, H.R. 3299, 101st Cong., 1st Sess., 135 Cong. Rec. H6131 (daily ed. Sept. 27, 1989), anticipated that these provisions might not pass in the first session:

> If these provisions do not pass this year, I intend to bring them to the floor again next year. Everyone should understand that if Congress fails to act on these provisions this year, it in now way reflects on their merits. Poor disabled children should receive individual functional assessments. It is fair, it is right, and they will receive functional assessments as soon as we can complete legislative action.

Statement of Rep. Downey, 135 Cong. Rec. E3930 (Nov. 17, 1989). Rep. Downey's statement mirrors a similar statement issued by the Senate Finance Committee last month disclaiming any inference to be drawn by the courts from Senate action. *See* 135 Cong. Rec. S13,205 (daily ed. Oct. 12, 1989). (Resp. Supp. Br. 4, n.3). *See also* *United States* v. *Price*, 361 U.S. 304, 310-11 (1960) (congressional inaction in face of proposed legislation addressing a judicial decision is inadequate basis for inferring anything).

The Secretary can find little comfort in a Congress that has refused to give any approval to his current polices and is considering alternative clarifications, all of which reject the Secretary's current interpretation of the Act.

IV. CONCLUSION

For the foregoing reasons and those stated in respondents' prior briefs, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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